Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

LEE BACA, Sheriff of the County of Los Angeles and successor in office to Sherman Block,

*Petitioner,*

v.

BEN LEE, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division One**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is California Code of Civil Procedure section 715.050, which states that a writ of possession in an unlawful detainer action shall be enforced "without delay, notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding," invalid under the Supremacy Clause, Article VI, of the United States Constitution, where 11 U.S.C. § 362 provides that the filing of a bankruptcy petition stays all judicial proceedings, including employment of process and enforcement of a judgment or attempts to collect any claim against the debtor or against the property of the debtor's estate?

## LIST OF PARTIES

The parties to the proceeding below were the petitioner and defendant Lee Baca, Sheriff of Los Angeles County, California, his predecessor in office, Sherman Block, former Sheriff of Los Angeles County, California, and plaintiffs Ben Lee, Apartment Association of Greater Los Angeles, a corporation, Apartment Association of San Fernando Valley/Ventura, a corporation, Apartment Association of California Southern Cities, a corporation, Foothill Apartment Association, a corporation, and Minority Apartment Owners Association, a corporation.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Lee Baca, Sheriff of Los Angeles County, California, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division One, entered in the above proceeding on July 29, 1999.

## OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division One, is reported as *Lee v. Baca* at 73 Cal. App. 4th 1116, 86 Cal. Rptr. 2d 913, and is reprinted in the Appendix (App.) at pp. 1-10, *infra*.[1] The judgment of the Los Angeles County Superior Court that was reversed by the California Court of Appeal was not reported. It is reprinted in the Appendix at pp. 11-12, *infra*.

The California Supreme Court's order denying review of the Court of Appeal's opinion was not reported. It is reprinted in the Appendix at p. 13, *infra*.

[1] The underlying action was brought against petitioner Baca's predecessor in office, Los Angeles County Sheriff Sherman Block, in his official capacity. The official case report reflects petitioner Baca as the respondent on appeal, Sheriff Block having died and petitioner Baca having been elected Sheriff during the pendency of the suit. The Court of Appeal Slip Opinion and Supreme Court Order denying review reflect the original caption in the case.

## JURISDICTION

The Opinion of the California Court of Appeal, Second Appellate District, Division One, was entered on July 29, 1999. App. at p. 1. On September 7, 1999, petitioner timely filed a Petition for Review in the California Supreme Court pursuant to California Rules of Court, rules 28(b) and 40(n). On October 20, 1999, the California Supreme Court issued its order summarily denying the Petition for Review. App. at p. 13.

The jurisdiction of this Court to review the judgment of the California Court of Appeal, Second Appellate District, Division One, is invoked under 28 U.S.C. § 1257. As review of the Court of Appeal decision reveals, the Court squarely addressed the federal preemption and Supremacy Clause issue set forth in the Question Presented for review. *Orr v. Orr*, 440 U.S. 268, 274-75, 99 S. Ct. 1102, 1109, 59 L. Ed. 2d 306 (1979) (state court's resolution of federal question demonstrates federal question properly raised in proceedings). Moreover, as required by Supreme Court Rules, rule 14.1(h), the Statement of the Case, *infra*, specifies the stages in the proceedings both in the court of first instance and the appellate court at which the federal question sought to be reviewed were raised.

The Court of Appeal's decision constitutes a final and conclusive ruling on the federal issue presented, and the outcome of further proceedings is preordained. The Court of Appeal has remanded the matter for entry of a permanent injunction, directing petitioner to enforce the California statute in question and to calculate any possible damages. App. at p. 9 n.4. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485-86, 95 S. Ct. 1029, 1041-42, 43 L. Ed. 2d

328 (1975) (opinion of Georgia Supreme Court reversing summary judgment and rejecting First Amendment defense to invasion of privacy action final for purposes of Supreme Court review even though further trial proceedings contemplated because the judgment "is plainly final on the federal issue and is not subject to further review in the state courts," "the litigation could be terminated by [Supreme Court decision] on the merits and . . . a failure to decide the question now will leave the [petitioner] in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt"); *Asarco, Inc. v. Kadish*, 490 U.S. 605, 611-12, 109 S. Ct. 2037, 2042, 104 L. Ed. 2d 696 (1989) (judgment of Arizona Supreme Court granting plaintiffs declaratory judgment based on determination that state law was invalid as in conflict with federal provisions, final for purposes of review even though case remanded for determination of "what further relief is appropriate," because determination of federal issue is conclusive and further proceedings would not affect that issue); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 179-80, 108 S. Ct. 1704, 1709, 100 L. Ed. 2d 158 (1988) (Ohio Supreme Court ruling upholding state regulation against federal preemption attack final for purposes of Supreme Court review even though matter remanded for further proceedings concerning ultimate relief, because the federal question "has been finally determined by the Ohio Supreme Court, and a reversal of the . . . Court's holding would preclude any further proceedings" and a "unreviewed decision of the . . . Court might seriously erode federal policy in the area of nuclear production"

which would have "important implications for the regulation of federally owned nuclear production facilities . . . ").

Pursuant to Supreme Court Rules, rule 29.4(c), petitioner notes that this proceeding draws into question the constitutionality of California Code of Civil Procedure section 715.050, that neither the State of California nor any of its agents, officers or employees is a party and hence 28 U.S.C. § 2403(b) may be applicable. Petitioner is therefore serving a copy of this petition on the Attorney General of the State of California.

## STATUTES INVOLVED

### A. United States Constitution, Article VI, Clause 2, Supreme Law of the Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

### B. 11 U.S.C. § 362(a)(1)-(3) and (6).[2]

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of the

[2] A full copy of the text of 11 U.S.C. § 362 is too lengthy to excerpt here, and is included in the Appendix at pp. 14-23.

title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. section 78eee(a)(3)), operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; . . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . . .

**C. 11 U.S.C. § 362(h).**

An individual injured by any wilful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

**D. 11 U.S.C. § 541.[3]**

**E. California Code Of Civil Procedure Section 715.050, Unlawful Detainer – Enforcement Of Writ Of Possession Without Delay.**

Except with respect to enforcement of a judgment for money, a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay, notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding.

This section does not apply to a writ of possession issued for possession of a mobilehome or manufactured home, as those terms are defined in subdivision (a) of section 1161a, and does not apply to a writ of possession issued for possession of real property in a mobilehome park subject to the Mobilehome Residency Law (chapter 2.5 (commencing with Section 798) of Title 2 of Part 2 of Division 2 of the Civil Code), or to a manufactured housing community, as defined in Section 18801 of the Health & Safety Code.

## STATEMENT OF THE CASE

Plaintiff and appellant Ben Lee is the owner of property located at 2414 Ridgewood #2, West Covina, California. Lee rented these premises to the tenants, Carlos

[3] The text of 11 U.S.C. § 541 is too lengthy to excerpt here and is included in the Appendix at 24-28.

Navarro and Alma Rodriguez, who failed to pay rent pursuant to the terms of their agreement.

On June 25, 1998, Lee was awarded a judgment for possession of the premises in an unlawful detainer action against the tenants. On July 8, 1998, Lee obtained a Writ of Possession commanding the sheriff to place Lee in possession of the premises instead of the tenants.

Lee served the Writ of Possession upon the Los Angeles County Sheriff's Department on July 9, 1998. The Sheriff's Department scheduled enforcement of the writ to physically evict the tenants for July 22, 1998.

Before the Writ could be executed, however, the tenants filed a Voluntary Petition in Bankruptcy on July 17, 1998. The Sheriff's Department received notice of the bankruptcy filing and refused to enforce the writ pending a Relief of Stay hearing set for August 11, 1998.

The tenants vacated the premises on or about August 10, 1998.

On September 18, 1998, the Plaintiffs and Appellants Ben Lee and various Apartment Associations filed, in Los Angeles County Superior Court, a Petition for Writ of Mandate and Complaint for Declaratory Relief, Permanent Injunction and Damages against then Los Angeles County Sheriff Sherman Block.

The plaintiffs alleged that the Sheriff's failure to enforce the writ of possession, despite the tenants' bankruptcy filing, caused Lee damages in the form of lost rent from July 22, 1998 to August 10, 1998. Lee and the other plaintiffs also allege that they were entitled to a Writ of Mandate, declaratory relief and a permanent injunction

requiring the Sheriff to enforce writs of possession even in cases where there is an automatic bankruptcy stay.

Defendant Los Angeles County Sheriff filed a demurrer, asserting the complaint and petition failed to state facts sufficient to constitute a cause of action or to entitle the plaintiffs to relief. The Sheriff contended among other things, that Code of Civil Procedure section 710.050 (West 1987) requiring enforcement of writs of possession in spite of a bankruptcy stay, is preempted by federal bankruptcy law and invalid under the Supremacy Clause.

On November 17, 1998, the trial court sustained the Sheriff's demurrer to the entire Petition and Complaint without leave to amend and dismissed the action. App. at p. 12.

The plaintiffs filed their notice of appeal on or about December 17, 1998. On appeal, the Sheriff reiterated his argument that section 715.050 was invalid under the Supremacy Clause. Following oral argument, on July 29, 1999, Division One of the California Court of Appeal, Second Appellate District issued a published opinion rejecting the Sheriff's argument and reversing the judgment. App. at p. 1.

On September 7, 1999, the Sheriff filed a Petition for Review in the California Supreme Court, asserting section 715.050 was invalid under the Supremacy Clause. App. at pp. 29-30. On October 20, 1999, the California Supreme Court issued its order denying the petition for review. App. at p. 13.

## REASONS WHY CERTIORARI SHOULD BE GRANTED

**REVIEW IS WARRANTED BECAUSE CALIFORNIA HAS IMPERMISSIBLY EXEMPTED WRITS OF POSSESSION IN RESIDENTIAL UNLAWFUL DETAINER ACTIONS FROM THE AUTOMATIC STAY PROVISIONS OF THE BANKRUPTCY ACT, 11 U.S.C. § 362 AND COMPLIANCE WITH THIS STATE LAW REQUIRES COUNTY LAW ENFORCEMENT OFFICIALS TO UNDERMINE AND ACT IN CONTRAVENTION TO EXPRESS FEDERAL POLICY, AS WELL AS SUBJECTS SUCH OFFICIALS TO CONTEMPT CITATIONS AND ACTIONS FOR ATTORNEYS FEES, COSTS AND PUNITIVE DAMAGES UNDER 11 U.S.C. § 362(h).**

California Code of Civil Procedure section 715.050 expressly provides that writs of possession in residential unlawful detainer actions are not subject to the automatic stay provisions of the federal Bankruptcy Code, 11 U.S.C. § 362(a). In a published opinion left undisturbed by the California Supreme Court, the California Court of Appeal has held that the provision does not run afoul of the Supremacy Clause, and the Sheriff should be directed to comply with the statute and execute writs of possession by eviction, even if a tenant has filed a bankruptcy petition.

In so holding, the court concluded the stay was inapplicable, since once the unlawful detainer judgment issued, the tenant no longer had a legal interest in the premises that would constitute property of the estate under the Bankruptcy Code. The court also concluded that the California statute was a necessary measure to deter tenants from filing frivolous bankruptcy petitions

simply in order to avoid eviction and relieve landlords of the obligation of having to file a motion for relief from stay in the bankruptcy court in order to proceed with evictions.

As the Court of Appeal acknowledged, however, two federal courts in California have expressly disagreed, with both concluding that unlawful detainer judgments are subject to the automatic stay and one expressly finding that California Code of Civil Procedure section 715.050 runs afoul of the Supremacy Clause and is preempted. *In re Acorn Invs.*, 8 B.R. 506 (Bankr. S.D. Cal. 1981); *In re Di Giorgio*, 200 B.R. 664 (C.D. Cal. 1996), vacated as moot, 134 F.3d 971 (9th Cir. 1998). Indeed, in the latter case, the district court expressly upheld a bankruptcy court's injunction barring the petitioner here – the Los Angeles County Sheriff – from enforcing writs of possession and proceeding with evictions, concluding that section 715.050 was invalid under the Supremacy Clause.

Although the district court's opinion in *Di Giorgio* was vacated as moot – the tenant/debtor having vacated the premises – nonetheless, its sound reasoning and that of the district court in *In re Acorn Invs.*, 8 B.R. 506, clearly support the conclusion that California Code of Civil Procedure section 715.050 is invalid under the Supremacy Clause. The result is that the Sheriff of the County of Los Angeles, and indeed all sheriffs throughout the State of California who are obligated to enforce judgments, including residential evictions, are faced with an untenable Hobson's choice. If they follow the dictates of *In re Acorn Invs.*, and *Di Giorgio* and decline to enforce writs of execution in residential unlawful detainer actions, then

they will be subject to actions for mandate or injunctive relief and damages in state court based upon the Court of Appeal's opinion. Alternatively, if they enforce section 715.050 and proceed with residential evictions, they are subject to a possible contempt citation by the federal bankruptcy court and an action by the debtor for damages, including punitive damages and attorneys fees and costs for violating the automatic stay. Indeed, a California district court has expressly held that a debtor's remedy for violation of an automatic stay by a Sheriff enforcing a writ of execution for residential eviction is an action for contempt and damages under 11 U.S.C. § 362(h). *Periera v. Chapman*, 92 B.R. 903 (C.D. Cal. 1988).

At the same time, enforcement of section 715.050 significantly erodes fundamental bankruptcy policy by allowing eviction to proceed in residential unlawful detainer actions despite the fact that Congress has expressly declined to enact such an exemption. Although Congress has exempted unlawful detainer proceedings involving non-residential property from the stay (11 U.S.C. § 362(b)(10)), it has twice specifically rejected a similar exemption for residential unlawful detainer actions.

Virtually every court in California, state or federal, that has expressly addressed the question has recognized its broad impact – hundreds, even thousands of tenants file bankruptcy petitions each year, and law enforcement officers throughout the state are confronted on a daily basis with the question of whether or not to enforce section 715.050. It is therefore essential that this Court grant review to settle this important question.

**A. The Automatic Stay Provisions of The Federal Bankruptcy Code.**

11 U.S.C. § 362(a) provides in pertinent part that the filing of a bankruptcy petition operates as a stay applicable to:

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate, or to exercise control over property of the estate; . . .
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. . . .

11 U.S.C. § 541(a)(1) in turn, defines "property of the estate" for purposes of the automatic stay of section 362(a) as including "all legal *or equitable* interests of the debtor in property as of the commencement of the case." (Emphasis added.) A federal bankruptcy court looks to state law in order to determine what "legal or equitable interests" the debtor had in the subject property at the time the bankruptcy petition was filed. *See Butner v. United States*, 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136

(1979); *In re Farmers Mkts., Inc.*, 792 F.2d 1400 (9th Cir. 1986). Once a federal court determines that state law confers a property interest, then federal law is applied to determine if that interest is part of the bankruptcy estate. *In re Di Giorgio*, 200 B.R. at 673 n.4.

The purpose of the automatic stay provision is to protect both the debtor, as well as the property of the estate. As the leading commentator in this area has observed: "Staying enforcement against the debtor gives the debtor breathing space, free of creditor harassment. Staying enforcement against property of the estate protects the property against piecemeal liquidation and also assures that the trustee or debtor in possession can distribute the property of the estate in an equitable manner or use the property in a reorganization effort." 3 Collier on Bankruptcy, ¶ 362.03[4] at 362-19-362-20 (15th ed. 1999).

California Code of Civil Procedure section 715.050 clearly allows the maintenance and the continuation of proceedings against the debtor as well as against the debtor's property, and thus undermines Congressional policy underlying the automatic stay provisions. It is therefore flatly invalid under the Supremacy Clause.

**B. Regardless of the Status of the Property Interest Under California Law, A Residential Unlawful Detainer Judgment and Writ of Possession are Subject To the Automatic Stay as Attempts to Continue Proceedings, Enforce A Judgment Or Collect Claims Against *the Debtor* Under 11 U.S.C. § 362(a)(1), (2) and (6).**

In upholding California Code of Civil Procedure section 715.050, the Court of Appeal focused solely on the question of whether enforcement of a writ of possession in a residential unlawful detainer action constituted an action against the *property* of the estate. It then erroneously concluded that a tenant/debtor had no valid interest in the premises upon issuance of an unlawful detainer judgment and hence possession did not constitute property of the estate for purposes of the bankruptcy stay. Significantly, however, the court turned a blind eye to 11 U.S.C. § 362(a)(1), (2), and (6) which prohibit a continuation of proceedings or actions to enforce a judgment or assert a claim against *a debtor*, and not simply proceedings directly against the property of the estate. However, as federal courts and the leading commentator in the area have recognized, writs of possession in residential unlawful detainer actions necessarily constitute proceedings against the debtor and hence are foreclosed under section 362.

In *In re Acorn Invs., Inc.*, 8 B.R. 506, the court held that a California unlawful detainer judgment could not be enforced through eviction once the tenant/debtor filed bankruptcy because the automatic stay barred enforcement of a judgment against the debtor:

> When plaintiff obtained its final default judgment [in the unlawful detainer proceeding], the debtor's right to possession of the premises was terminated. . . . [Citation.] This ended the landlord tenant relationship under state law. . . . [Citation.] [¶] This fact, however, does not mean that the stay under Section 362 did not 'attach' to protect the debtor's leasehold interest. . . . The existence of a legal or equitable interest of the debtor in certain property does not activate the stay's operation here, *as Section 362(a)(2) prohibits the enforcement of a prepetition judgment against the debtor regardless of the status of any property interest involved.* . . . [Citation.] Section 362(a)(2), therefore, would enjoin an attempt to regain possession of the debtor's former leasehold. This is so because the levy of a writ of execution for possession of realty [citation] would constitute an attempt to enforce a prepetition judgment of unlawful detainer *against the debtor.*

8 B.R. at 509 (emphasis added).

The court also noted that "[a] levy of the writ of execution would also be stayed by Section 362(a)(1), as this section prohibits the continuation of any 'judicial proceeding' against the debtor." 8 B.R. at 509 n.3.

The court in *Di Giorgio* came to a similar conclusion, holding that enforcement of a writ of possession in a residential unlawful detainer action would violate the automatic stay as an action against, or attempt to enforce a judgment against *the debtor* under 11 U.S.C. § 362(a)(1) and (2). *See* 200 B.R. at 674-75. Not surprisingly, the leading commentator in the area has come to the same conclusion:

> Even a properly based termination, for example, one based on non-payment of rent or other violation of a lease or contract, is stayed under the instant paragraph or under section 362(a)(6), which broadly stays acts "to collect, assess or recover a claim against *the debtor*."

3 Collier on Bankruptcy, ¶ 362.03[5][a] at 362-22-362-23 (emphasis added).

As the *Acorn* court noted, its view was consistent with that expressed by other federal courts. *See*, 8 B.R. at 509 (citing *In re Matter of GSVC Restaurant Corp.*, 3 B.R. 491, 494-95) (Bankr. S.N.Y. 1980); *In re Matter of Racing Wheels, Inc.*, 5 B.R. 309 (Bankr. M.Fla. 1980); *In re Matter of Mimi's of Atlanta, Inc.*, 5 B.R. 623, 626-27 (Bankr. N.Ga. 1980). Somewhat astoundingly, the Court of Appeal opinion does not address this point or these authorities. Its omission in this regard flatly undermines its characterization and dismissal of *Acorn* as "decided in summary manner." App. at p. 7 n.3.

Since enforcement of the writ of possession would clearly constitute continuation of legal proceedings, enforcement of the judgment or actions to collect a claim against "the debtor" under 11 U.S.C. § 362(a)(1), (2), and (6), the automatic stay applies to such action, regardless of whether the tenant's possessory interest is property of the estate under 11 U.S.C. § 541.

### C. Execution Of An Unlawful Detainer Judgment And Writ Of Possession Constitutes Action Against, Or An Attempt To Obtain "Property Of The Estate" And Is Hence Subject To The Automatic Stay Under 11 U.S.C. § 362(a)(3).

#### 1. California Law Recognizes That Possession Confers An Equitable Interest In Property And Such Interests Are Part of the Bankruptcy Estate Under Federal Law.

The Court of Appeal's opinion contains no thorough examination of California law concerning a residential tenant's property rights following entry of an unlawful detainer judgment. Rather, the court simply cites *In re Smith*, 105 B.R. 50 (Bankr. C.D. Ca. 1989) and the Ninth Circuit decision cited therein – *In re Windmill Farms*, 841 F.2d 1467, 1469-71 (9th Cir. 1988). Yet, as the district court noted in *Di Giorgio*, the *Smith* court's analysis is cursory and incomplete. 200 B.R. at 671. Not surprisingly, the Court of Appeal's decision shares this patent defect.

The *Smith* court held that unlawful detainer judgments and writs of possession did not fall within the automatic stay because under California law the tenant had no *legal* right in the premises vis-a-vis the landlord once the judgment was entered. *See Smith*, 105 B.R. at 53-54 (citing *In re Windmill Farms*, 841 F.2d 1467). Hence, there was no action against "property of the estate." However, neither *Smith* nor, correspondingly, the Court of Appeal's opinion here, contains any discussion of whether California recognizes an *equitable* right arising from mere possession of property. The omission is fatal to the courts' reasoning.

As the district court recognized in *Di Giorgio*, while there is no dispute that California law does not recognize a tenant's *legal* right to possession following an unlawful detainer judgment, the inquiry cannot stop there. Since the Bankruptcy Code by its plain terms also encompasses "equitable" interests in property, the question becomes whether California recognizes any equitable rights arising from possession of property. *In re Di Giorgio*, 200 B.R. at 671-672. As the court held, California law clearly recognizes such rights:

> Under California law mere possession of real property creates a protected interest. "Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession. . . . " Cal.Civ.Code section 1006. Under the common law as well, "the mere possession of real estate is constantly treated as property which may be purchased and sold, and for the recovery of which an action may be maintained against one having no better title." *King v. Goetz*, 70 Cal. 236, 240, 11 P. 656, 658 (1886); see also *Bond v. Aickley*, 168 Cal. 161, 141 P. 1188 (1914) (same as Cal.Civ.Code section 1006).
>
> Therefore, "[o]ne in possession of property has rights therein superior to those of all who have no better title." 51 Cal. Jur.3d, Property § 9. The Court therefore rules that the Di Giorgios' possession of the property constitutes an equitable interest under California law.

200 B.R. at 671.

The Court of Appeal doesn't address, much less dispute the *Di Giorgio* court's analysis in this regard. Moreover, any suggestion that Code of Civil Procedure section 710.050 somehow alters California law concerning equitable rights arising from possession of real property is simply untenable. Section 710.050 merely provides that "a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay, notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding." As the *Di Giorgio* court observed, by its plain terms section 710.050 doesn't mention, let alone change California law concerning equitable rights arising from possession of property; in fact, it doesn't mention "rights" at all, but simply directs law enforcement officials to ignore the automatic stay when enforcing writs of possession. 200 B.R. at 672.

Moreover, even assuming section 710.050 could somehow be construed as addressing equitable rights, the fact that it does so only with respect to unlawful detainer proceedings involving bankruptcy petitions and does not attempt to address, much less re-define equitable real property interests in other contexts, bars its application under 11 U.S.C. § 541(c)(1). That provision states that except in circumstances not applicable here, "an interest of the debtor in property becomes property of the estate under . . . this section notwithstanding any provision in an agreement, transfer instrument, or *applicable non-bankruptcy law . . .* [¶] *that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title . . . and that*

*effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property." Id.* (emphasis added). As the leading treatise notes: "Subdivision (c) invalidates and makes unenforceable any contractual effort to limit or prevent property that would otherwise be included in the estate from becoming property of the estate. *It also overrides any applicable nonbankruptcy law that would have the same effect."* 5 Collier on Bankruptcy, ¶ 541.01 at 541-8 (emphasis added).

California Code of Civil Procedure section 710.050 runs afoul of § 541(c) precisely because to the extent it concerns equitable possessory interest under California law, it is triggered solely where the tenant has filed a bankruptcy petition. Thus, while California law might recognize the equitable possessory rights of a tenant even after an unlawful detainer judgment (say for an ejection action against a third party trespasser), section 710.050 recognizes no such equitable possessory rights in circumstances where the tenant has filed a bankruptcy petition. Quite simply, the state provision singles out bankruptcy debtors for special treatment, an action squarely prohibited by 11 U.S.C. § 541(c).

Regardless of whether California Code of Civil Procedure section 715.050 is interpreted as directing state officials to ignore federal bankruptcy stays, or whether it is viewed as simply defining "equitable" rights differently in the unlawful detainer context than in other areas of California law, it runs afoul of the Supremacy Clause.

California law clearly recognizes equitable rights arising from mere physical possession of property.

Neither the Court of Appeal's opinion here, nor *Smith* suggest otherwise.

### 2. Under Section 541 of The Bankruptcy Code An Equitable Possessory Interest in Residential Property is Property Of The Bankruptcy Estate and Hence Shielded By The Stay.

11 U.S.C. § 541 makes it clear that property of the bankruptcy estate includes any legal or equitable interest in property. Since California law recognizes an equitable interest arising from possession of residential real property, then any action affecting that interest necessarily falls within the automatic stay. Moreover, as the *Di Giorgio* court recognized, the Bankruptcy Code itself contemplates that an equitable possessory interest in residential property is part of the bankruptcy estate.

Numerous federal courts have recognized that such possessory interests in property fall within 11 U.S.C. § 541. *See In re Convenient Food Mart No. 44, Inc.*, 968 F.2d 592 (6th Cir. 1992); *In re Atlantic Bus. and Community Corp.*, 901 F.2d 325 (3d Cir. 1990); *In re 48th Street Steakhouse*, 835 F.2d 427 (2d Cir. 1987); *In re Di Giorgio*, 200 B.R. at 673. In addition, as the *Di Giorgio* court observed, the bulk of cases that conclude possessory interests are not part of the bankruptcy estate (including those cited by the Court of Appeal here) involve *nonresidential* property and are singularly unhelpful since the Bankruptcy Code itself singles out nonresidential property for different treatment. *See* 200 B. R. at 672 n.3 and 673-74 (citing and distinguishing *In re Windmill Farms*, 841 F.2d at 1469); *In re Escondido West Travelodge*, 52 B.R. 376 (Bankr. S.D. Cal.

1985); *In re Scarsdale Tires, Inc.*, 47 B.R. 478, 480 (Bankr. S.D. N.Y. 1985); *In re Cohoes Indus. Terminal, Inc.*, 62 B.R. 369, 377 (Bankr. S.D. N.Y. 1986), *aff'd*, 70 B.R. 214 (Bankr. S.D. N.Y. 1987); *In re Lady Liberty Tavern Corp.*, 94 B.R. 812, 817 (Bankr. S.D. N.Y. 1988); *see also*, Appendix, p. 7 n.3.

Indeed, the legislative history underlying the Bankruptcy Code makes it clear that Congress intended possessory interests be included, at least in some contexts, in the bankruptcy estate. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868 ("debtor's interest in property includes 'title' to property which is an interest, *just as are possessory interests*, or leasehold interests"); *see also In re Di Giorgio*, 200 B.R. at 672 (citing same).

Moreover, as both *Di Giorgio* and the leading treatise observe, Congress expressly exempted expired *nonresidential* leasehold interests from inclusion in the bankruptcy estate and the automatic stay, but has declined to broaden the exemption to include residential leasehold interests. This makes it clear that if anything, Congress intends that such residential leasehold interests – including merely possessory interests – are necessarily part of the estate and hence subject to the stay. *See* 200 B.R. at 672 ("The fact that Congress created an exception under section 541(b)(2) applying expressly to the interest in an expired lease of nonresidential property suggests that Congress intended possessory interests in residential property to be included in the property of the estate"); 5 Collier on Bankruptcy, § 541.20, p. 541-96 ("Section 541(b)(2), added to the Code in 1984, expressly provides that a lease of non-residential real property under which the debtor is the lessee does not become property of the

estate if the term of the lease expires before the case is commenced. If the term of the lease expires during the case, section 541(b)(2) provides that the leasehold interest ceases to be included in the property of the estate as of the lease's expiration. *By negative implication, from section 541(b)(2), rights arising from other types of leases that expire prior to the case, such as the right of possession, continue to be property of the state [sic] after the lease expires"*) (emphasis added); *see also id.* at ¶ 326.03[5][a] pp. 362-21-362-22 ("When the property in question is no longer property of the estate on the petition date, the automatic stay of action against property of the estate no longer applies. Thus, for example, if a contract or lease terminated prior to the commencement of a case, it will not become property of the estate, and the other party may treat the agreement as terminated. *However, if the debtor has retained possession of the property, other than non-residential real estate, the stay may apply to an attempt to recover the property"*); 11 U.S.C. § 541(b)(2); 11 U.S.C. § 362(b)(10).

In fact, Congress has repeatedly rejected attempts to amend the Bankruptcy Code to provide a similar exemption for residential possessory interests. *See Di Giorgio,* 200 B.R. at 672-73 ("On two occasions, a bill has been introduced . . . to amend § 541(b) to exempt from property of the bankruptcy estate 'any interest of the debtor as a tenant under the rental of residential real property that has terminated before the commencement of the case.' H.R. 1156, 103d Cong., 1st Sess. (1993); H.R. 2202, 102d Cong., 1st Sess. (1992). This bill also would have amended § 362(b) so that the automatic stay would not apply to 'any action to evict the debtor from residential real estate occupied by the debtor as a tenant under a rental agreement.' Id. Where Congress has declined to

enact such exceptions, it is not the Court's province to do so. Therefore, the bankruptcy court correctly held that enforcement of the writ of possession violated § 362(a)(3)").

Significantly, the *Smith* court cited legislative inaction as the basis for its conclusion that writs of possession are not be subject to the automatic stay, bemoaning the lack of lobbying clout exercised by residential landlord groups. *See* 105 B.R. at 55-56 ("This opinion may be viewed by some as judicial legislation. I observe that this abuse of the bankruptcy court system has been communicated to Congress. Congress has failed to address the problem, perhaps because landlords of residential real property do not have as loud a lobbying voice as commercial landlords who have been able to effect large and significant revisions in the Bankruptcy Code in order to protect their interests") (footnote omitted). The Court of Appeal similarly based its decision largely on its conclusion that allowing evictions despite the bankruptcy stay would be good public policy – protecting residential landlords, conserving costs, and avoiding abuse of the bankruptcy courts. App. at pp. 5-8.

Whether allowing enforcement of writs of possession in residential unlawful detainer actions despite the filing of bankruptcy is sound public policy is obviously beside the point. Such policy decisions concerning the bankruptcy system are for Congress to make, not the courts. The plain language and legislative history of the pertinent Bankruptcy Code provisions make it clear that equitable possessory interests in residential real property are part of the bankruptcy estate and hence execution of a writ of possession is subject to the automatic stay. Neither

a state, nor a federal court is free to "amend" the provisions through judicial fiat, even in the name of sound public policy.

**D. Since Code of Civil Procedure Section 710.050 Purports To Exempt Writs of Possession From The Automatic Stay, It is Contrary to Federal Policy and Hence Preempted Under The Supremacy Clause.**

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution, invalidates any state laws that interfere with or are contrary to federal laws. While the federal bankruptcy laws are not intended to wholly displace state law, nonetheless it is clear that state law will be preempted by federal bankruptcy provisions when it actually conflicts with the federal statutes – i.e., it is impossible to comply with both the state and federal provisions in question. *See Perez v. Campbell*, 402 U.S. 637, 648-52, 91 S. Ct. 1704, 1710-12, 29 L. Ed. 2d 233 (1971); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S. Ct. 2371, 2375, 85 L. Ed. 2d 714 (1985); *In re Baker & Drake, Inc.*, 35 F.3d 1348, 1353 (9th Cir. 1994). State law also runs afoul of the Supremacy Clause and will be preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.*) Moreover, as the Ninth Circuit noted in *In re Baker & Drake, Inc., supra*, 35 F.3d at 1353, federal bankruptcy provisions will more likely be found to preempt state statutes where the state regulation "facially or purposefully carves an exception out of the Bankruptcy Code" or where it "is concerned with economic regulation rather than with protecting the public health and safety."

As the district court recognized in *Di Giorgio*, Code of Civil Procedure section 710.050 meets every criteria for preemption under the Supremacy Clause. 200 B.R. 664. First, as noted above, it is clear that writs of possession in residential unlawful detainer actions fall within the automatic stay; thus compliance with *both* section 710.050 and 11 U.S.C. § 362 is impossible – the federal statute says execution of such judgments is stayed, while the state statute directs the state officer to go ahead and execute the writ. In fact, the Court of Appeal here determined that defendant failed to comply with section 710.050 and directed entry of an injunction on remand to force defendant to do so (App. p. 9 n.4), precisely because defendant felt compelled to obey the dictates of the federal statute.

Second, enforcement of section 710.050 clearly stands as an obstacle to accomplishing the purposes and objectives of Congress. Again, given that Congress intended that such possessory interests be included in the bankruptcy estate, and shielded from further state process by the stay once the bankruptcy petition is filed, section 710.050 utterly defeats this aim. It also contravenes Congress' express dictate that regardless of the status of a debtor's property interest that the stay applies to all actions, including enforcement of a judgment or attempt to collect a claim against *the debtor*. *See Perez v. Campbell*, 402 U.S. at 648-52, 91 S. Ct. at 1710-12 (invalidating Arizona law which purported to exempt certain state imposed debts from discharge in bankruptcy).

In addition, by its plain terms, section 710.050 is designed to carve "an exception out of the Bankruptcy Code" and is primarily "concerned with economic regulation." *In re Baker & Drake*, 35 F.3d at 1353; *In re Di Giorgio*,

200 B.R. at 669-70; *Perez v. Campbell*, 402 U.S. at 648, 91 S. Ct. at 1710-11. For example, section 710.050 does not alter application of the automatic stay as to any other sort of judgments (not even money judgments in unlawful detainer actions) – rather, it singles out a particular type of judgment – a writ of possession – in a specific type of proceeding – an unlawful detainer action – and purports to exempt it from the automatic stay. *See In re Di Giorgio*, 200 B.R. at 669-70. Indeed, as previously noted, it doesn't even purport to address, much less change equitable possessory rights under California law in any other context; it simply creates a "special" rule for purposes of attempting to avoid application of the automatic stay.

Finally, it is clear that section 710.050 was enacted as purely economic legislation, at the behest, and for the unique benefit of, a particular group – landlords of residential property. As the district court observed in *Di Giorgio*, the legislative history of the provision establishes that it was enacted in order to avoid the very problem recognized by the *Smith* court and the Court of Appeal here – residential landlords being unable to immediately evict tenants following an unlawful detainer judgment without seeking relief from the stay from the Bankruptcy Court, solely because the tenant files a bankruptcy petition. *See* 200 B.R. at 670. However, that is a question of federal bankruptcy policy, and must, under the Constitution, be left up to Congress.

Because section 710.050 is flatly contrary to the provisions of federal law and defeats federal bankruptcy policy, it is preempted. The Court of Appeal's opinion plainly departs from controlling case, statutory and constitutional authority. It directs petitioner and indeed all

other Sheriffs in California to act in contravention of the United States Constitution and clear Congressional policy and subjects them to possible contempt sanctions and liability claims in federal courts. Absent this Court's intervention to clarify the law on this critical issue, petitioner and the other Sheriffs in California face the untenable choice of facing legal action in one forum or another, no matter what they do. Plainly, review is warranted.

## CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

| | | |
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| BEN LEE et al.,<br>Plaintiffs and Appellants,<br>v.<br>SHERMAN BLOCK,<br>as Sheriff, etc.,<br>Defendant and Respondent. | ) | B128410<br>(Super. Ct.<br>No. BC197745) |

(Filed Jul. 29, 1999)

APPEAL from orders of the Superior Court of Los Angeles County, Joseph R. Kalin, Judge. Reversed and remanded with directions.

California Apartment Law Information Foundation, Trevor A. Grimm and Craig Mordoh for Plaintiffs and Appellants.

Nelson & Fulton, Henry Patrick Nelson and Amber A. Logan for Defendant and Respondent.

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A residential tenant defaults. The landlord obtains an unlawful detainer judgment and a writ of possession of real property. Before the sheriff executes the writ, the tenant files a bankruptcy petition. The question in this

case is whether the landlord is required to apply to the bankruptcy court for relief from the automatic stay (11 U.S.C. § 362(a)) or whether the pre-bankruptcy judgment has extinguished whatever legal or equitable interest the debtor might have had in the real property – in which event the landlord is not required to seek relief from the bankruptcy court and is, instead, entitled to demand that the sheriff execute the writ of possession forthwith. We hold that the unlawful detainer judgment extinguishes the residential tenant's interest in the property and that a post-judgment bankruptcy filing does not affect the landlord's right to regain possession of his property – because it is not, at that point, property of the tenant/debtor's estate.

## FACTS

When Carlos Navarro and Alma Rodriguez failed to pay the rent due for the apartment they had rented from Ben Lee, Lee served the required notice to pay rent or quit, waited the required time to no avail, then filed an unlawful detainer action. The tenants defaulted, and a judgment was entered against them on June 25, 1998, declaring (among other things) that, as of that date, Lee had the right to recover possession of the premises. A writ of possession of real property was issued on July 8, which Lee delivered to the Sheriff of Los Angeles County along with the required fee. Enforcement (eviction) was scheduled for July 22. On July 17, the tenants filed a voluntary petition in bankruptcy and notified the Sheriff of the bankruptcy filing. The Sheriff, in turn, notified Lee of the tenants' bankruptcy and advised Lee that he would not enforce the writ of possession until Lee obtained

relief from the automatic stay. (11 U.S.C. § 362(a).) On August 10, the tenants abandoned the apartment.

In September, Lee (joined by several apartment owners' associations) filed a petition for a writ of mandate and a complaint for declaratory and injunctive relief and damages against the Sheriff. Lee asked for a declaration (and an injunction) to the effect that the Sheriff was required by law to enforce all validly issued writs of possession notwithstanding a tenant's post-judgment bankruptcy petition. Lee also sought damages for the rent he had lost by reason of the Sheriff's refusal to enforce the writ on July 22 (that is, the rent for the apartment for the 19 days beginning on July 23 and ending August 10, the date the tenants moved out), and attorneys' fees. The Sheriff demurred, successfully, and Lee now appeals from the order of dismissal thereafter entered.

## DISCUSSION

Lee contends his rights are determined by section 715.050 of the Code of Civil Procedure.[1] We agree.

Section 715.050 provides: "Except with respect to enforcement of a judgment for money, *a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay, notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding.* [¶] This section does not apply to a writ of possession issued for possession of a mobilehome or manufactured home [as those

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[1] Undesignated section references are to the Code of Civil Procedure.

terms are defined in other statutes]." (Italics added.) Since Lee's unlawful detainer judgment and his writ of possession were obtained before the tenants initiated their bankruptcy proceedings, section 715.050 compelled the Sheriff to proceed with the eviction as scheduled.

Not so, says the Sheriff, claiming that federal law is in conflict with and therefore preempts section 715.050. He points to 11 U.S.C. section 362(a), which provides that a bankruptcy petition "operates as a stay, applicable to all entities of – [¶] (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under [the bankruptcy statutes], or to recover a claim against the debtor that arose before the commencement of the case under [the bankruptcy statutes]; [¶] (2) the enforcement, against the debtor or against *property of the estate*, of a judgment obtained before the commencement of the case under [the bankruptcy statutes]; [¶] (3) any act to obtain possession of *property of the estate* or of property from the estate or to exercise control over *property of the estate*. . . ." (Italics added.)

The Sheriff's conflict is imagined, not real. 11 U.S.C. section 541(a)(1) defines "property of the estate" as used in 11 U.S.C. section 362(a) to include "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." Under California law (which governs the bankruptcy court's determination of this issue), a tenant has no legal or equitable interest in rented property once a judgment for possession has been entered in favor of the landlord. (*In re Smith* (Bankr.

C.D.Cal. 1989) 105 B.R. 50, 53-54; see also *Butner v. United States* (1979) 440 U.S. 48; *In re Farmers Markets, Inc.* (9th Cir. 1986) 792 F.2d 1400; *In re Windmill Farms, Inc.* (9th Cir. 1988) 841 F.2d 1467, 1469-1471.) It follows that, as of the June 25 entry of a judgment of possession in our case, the tenants lost whatever legal or equitable interest they might previously have had in their rented apartment and that, by the time the tenants commenced their bankruptcy case, the Sheriff's execution of the writ of possession would not have affected "property of the estate" of the debtor.

Our conclusion that section 715.050 survives a pre-emption attack is supported by the bankruptcy court's identical conclusion in *In re Smith, supra,* 105 B.R. 50. As Judge Vincent P. Zurzolo explained in *Smith,* "[m]ore than 39,000 Chapter 7 bankruptcy cases are filed in the Central District of California annually. A significant portion of these cases are apparently filed solely for the purpose of staying a residential landlord from dispossessing a debtor/tenant from a rented apartment or house. There is no exact count of these 'unlawful detainer' cases pending in this district, but over the past several months, eighty percent of the motions for relief from Stay filed in Chapter 7 cases that I have heard involve residential unlawful detainer actions.

"That these cases are filed solely for the purpose of staying enforcement of unlawful detainer judgments can be inferred from several facts: the commencement of the case by the filing of a 'bare bones' petition without any schedules or statement of affairs ever being filed; the listing of no, few, or false creditors, if schedules are indeed filed; the failure of the debtor to appear at the

mandatory . . . meeting of creditors; and the refusal of debtors in these cases to comply with the requirements of the Bankruptcy Code, the Bankruptcy Rules, or this court's Local Rules and thereby failing to obtain a discharge." (*In re Smith, supra,* 105 B.R. at pp. 51-52, fn. omitted.)[2]

For these reasons, *Smith* concludes that 11 U.S.C. sections 362(a)(1), (2) and (3), when read together, enjoin a landlord (or any creditor) from attempting to enforce a money judgment against a debtor or the debtor's bankruptcy estate, but they do *not* enjoin a landlord from enforcing a judgment for possession of real property obtained before the bankruptcy proceedings were initiated. A bankruptcy filed "to delay improperly the landlord from obtaining possession of his property" provides no benefit to the bankruptcy estate or to the creditors of the estate. (*In re Smith, supra,* 105 B.R. at p. 55.) "The purpose of the Stay is to give the bankruptcy estate and its fiduciary, either the trustee or the debtor-in-possession, an opportunity to gather together the assets of the estate, determine their value, and liquidate or reorganize them. This goal of the Stay is not achieved by applying it to a landlord's attempt to regain possession of residential real property wrongfully being held by a debtor/tenant." (*Ibid.*)

To the contrary, one of the consequences of "holding that the Stay applies to residential unlawful detainer evictions is that the cost of doing business as a residential

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[2] In our case, there is the added fact that, having stalled their eviction for 19 days, the tenants abandoned the property.

landlord rises with the additional expense of hiring lawyers not only to pursue an eviction in the state court but also to obtain relief from the Stay in Bankruptcy Court. This added cost necessarily increases the rent that must be paid by low-income tenants in the Los Angeles area, which is one of the most expensive urban rental markets in the country. The ever increasing rents for low-income housing, of course, only makes it harder for tenants to pay their rent and therefore leads to more abusive bankruptcy filings. Thus, this vicious cycle repeats and repeats." (*In re Smith, supra,* 105 B.R. at p. 55, fns. omitted.)

Based on the foregoing, *Smith* concludes "that the [automatic] Stay does not enjoin a landlord from regaining possession of residential premises from a wrongfully holding-over bankruptcy debtor/tenant, as long as the landlord seeks only to repossess the property and not to enforce any other portion of his unlawful detainer judgment against the debtor and the bankruptcy estate, such as collecting money damages." (*In re Smith, supra,* 105 B.R. at p. 55.)[3]

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[3] Another bankruptcy judge disagreed with *Smith* and was affirmed by the District Court (*In re Giorgio* (Bankr. C.D.Cal. 1996) 200 B.R. 664) but that opinion was vacated by the Ninth Circuit without reaching the merits of our issue (*In re Di Giorgio* (9th Cir. 1998) 134 F.3d 971). Most federal and state courts that have considered the "property of the estate" issue have agreed with *Smith's* interpretation of that phrase. (E.g., *In re Cohoes Indus. Terminal, Inc.* (Bankr. S.D.N.Y. 1986) 62 B.R. 369, 379 [slightly different context]; *In re Lady Liberty Tavern Corp.* (Bankr. S.D.N.Y. 1988) 94 B.R. 812; *In re Scarsdale Tires Inc.* (Bankr. S.D.N.Y. 1985) 47 B.R. 478, 480; *In re 163rd Street Medical Corp.* (Bankr. S.D.Fla. 1986) 67 B.R. 499, 500 [slightly different

Since the Sheriff simply ignores *Smith* (it is not even cited in his Respondent's Brief), and since *Smith* appears on its face to be legally correct, logical and fair under the circumstances, we shall follow *Smith* and conclude, as previously noted, that a judgment of possession rendered in an unlawful detainer action extinguishes whatever legal or equitable interest the residential tenant might have had in that property. As provided by section 715.050, the automatic stay that results from a tenant's post-judgment bankruptcy filing does not affect the landlord's right to execute on his judgment of possession of real property. It follows that, under the circumstances of this case, the Sheriff must follow the mandate of section

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context]; *White v. Indiana Realty Associates II* (Ind.App. 1988) 530 N.E.2d 326, 327; *Matter of Grant Food Products, Inc.* (Bankr. Del. 1988) 87 B.R. 6; *In re Cowboys, Inc.* (Bankr. S.D.Fla. 1982) 24 B.R. 15; but see *In re Acom Investments* (Bankr. S.D.Cal. 1981) 8 B.R. 506, 509 [contra with regard to a commercial lease].) *Acorn* (which was decided before *Smith*) concludes, without analysis, that although the tenant's right to possession of leased commercial premises terminates when the landlord obtains an unlawful detainer judgment, the automatic stay operates without regard to "[t]he existence of a legal or equitable interest of the debtor" in the property. (*In re Acorn Investments, supra*, 8 B.R. at p. 509.) In the context of a commercial lease (in *Acorn*, the debtor (tenant) was a restaurant), it is easy enough to see that a trustee might want to keep the enterprise in place in order to generate income for the benefit of all creditors, including the landlord. That analysis (which is ours, not *Acorn's*) does nothing to enhance the facts of our case, nor does the summary manner in which *Acorn* was decided. We nevertheless limit our holding to the facts before us, reiterate our concurrence with the views expressed in *Smith*, and simply note for the record that we are not bound by either *Smith* or *Acorn*. [*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

715.050, disregard the bankruptcy, and execute the writ of possession.[4]

## DISPOSITION

The order of dismissal and the order sustaining the Sheriff's demurrer are reversed, and the cause is remanded to the trial court with directions to (1) enter a new order overruling the Sheriff's demurrers to Lee's claims for declaratory and injunctive relief; (2) reconsider the Sheriff's demurrer to Lee's cause of action for damages; (3) determine whether Lee is entitled to an award of attorneys' fees and, if so, the amount of such an award;

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[4] We summarily reject the Sheriff's contention that this issue is moot. It is clearly a continuing problem for residential landlords in this county. (*Kirstowsky v. Superior Court* (1956) 143 Cal.App.2d 745, 749; *DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58.) We do not reach the remaining issues because the manner in which this case was resolved below leaves us without an appropriate record to do so. We leave it to the trial court on remand to determine the appropriate language for the declaration and injunction that Lee is entitled to have, to determine whether Lee is entitled to the damages claimed in his complaint (we think not [Gov. Code, § 821]), and to determine whether Lee is entitled to an award of attorneys' fees (and, if so, the amount of such an award). Insofar as the Sheriff questions the standing of the apartment owners' associations that have joined with Lee in this action, we fail to see what difference it makes whether they are in or out. Lee is clearly an appropriate petitioner and plaintiff, and he remains a party to these proceedings. The associations clearly have an interest in the permanent injunction that will now be issued in this case. They are all represented by the same lawyers representing Lee. This appears to be an argument made simply for the sake of argument, and we reject it out of hand.

and (4) make such other and further orders as are necessary. Lee is awarded his costs of appeal.

CERTIFIED FOR PUBLICATION.

VOGEL (Miriam A.), J.

We concur:

ORTEGA, Acting P.J.

MASTERSON, J.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES,
CENTRAL DISTRICT

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| BEN LEE, APARTMENT ASSOCIATION OF GREATER LOS ANGELES, et al.,<br><br>Petitioners and Plaintiffs,<br><br>vs.<br><br>SHERMAN BLOCK, Sheriff of Los Angeles County, California, Doe 1 and Doe 2,<br><br>Respondents and Defendants.<br><br>RICHARD NAVARRO and ALMA RODRIGUEZ,<br><br>Real Parties In Interest. | CASE NO. BC197745<br><br>**ORDER OF DISMISSAL FOLLOWING DEMURRER SUSTAINED WITHOUT LEAVE TO AMEND**<br><br>(Filed Dec. 3, 1998)<br><br>Date:<br>November 17, 1998<br>Time:<br>6:15 a.m.<br>Place:<br>Department 55<br>Judge:<br>Hon. Joseph R. Kalin |

The Demurrer of Respondent/Defendant, Sheriff Sherman Block, came on regularly for hearing on November 17, 1998 in Department 55, of the above-entitled court, Hon. Joseph R. Kalin, Judge presiding.

Upon a consideration of the Petition, the Demurrer, the Opposition, the Amicus Brief, the Reply, and the oral presentation of the attorneys at the Hearing:

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

That the Demurrer of Sheriff Sherman Block to the Plaintiffs' Petition and Complaint having been sustained without leave to amend, this action is DISMISSED.

DATED: DEC 3 1998

/s/ **JOSEPH R KALIN, JUDGE**
HON. JOSEPH R. KALIN
Judge of the Superior Court

Second Appellate District, Division One, No. B128410
S081921

IN THE SUPREME COURT OF CALIFORNIA

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BEN LEE Et Al., Appellants

v.

SHERMAN BLOCK, Respondent

(Filed Oct. 20, 1999)

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Respondent's petition for review DENIED.

GEORGE
Chief Justice

11 U.S.C. Sec. 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section –

(A) of the commencement or continuation of an action or proceeding for –

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

((5) Repealed. Pub. L. 105-277, div. I, title VI, Sec. 603(1), Oct. 21, 1998, 112 Stat. 2681-866;)

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of –

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and

such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of

Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement; or

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax

imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition. The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section –

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of –

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) –

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A

hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section –

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. Sec. 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include –

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that –

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or

(5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made –

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives,

or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable non-bankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the

debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Supreme Court Case No. S___
2d Civil No. B128410

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BEN LEE, et al.,

Plaintiffs and Appellants,

vs.

SHERIFF SHERMAN BLOCK,

Defendant and Respondent,

---

Appeal from the Los Angeles County Superior Court
Honorable Joseph R. Kalin, Judge
Superior Court Case No. BC197745

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# PETITION FOR REVIEW

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Attorneys for Defendant and Respondent
Sheriff Sherman Block

## QUESTION PRESENTED

Is Code of Civil Procedure section 715.050, which states that a writ of possession in an unlawful detainer action shall be enforced despite receipt of notice that the tenant has filed bankruptcy, invalid under the Supremacy Clause, Article VI of the United States Constitution, where 11 U.S.C. section 362 provides that the filing of a bankruptcy petition stays all actions against a debtor or against the equitable or legal interests in property of the debtor, and California law recognizes in all other contexts equitable possessory interests in real property?

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Supreme Court, U.S.
FILED
FEB 11 2000
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No. 99-1190

In The

# Supreme Court of the United States

LEE BACA, Sheriff of the County of Los Angeles and successor in office to Sherman Block,

*Petitioner,*

v.

BEN LEE, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal, Second Appellate District, Division One**

## PETITIONER'S SUPPLEMENTAL BRIEF

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## PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner Lee Baca hereby submits a supplemental brief to advise the court of an event that occurred after the filing of the Petition for Writ of Certiorari, which is relevant to the issues raised therein.

As set forth in the Petition for Writ of Certiorari, Petitioner seeks review of the California Court of Appeal's published decision holding that California Code of Civil Procedure section 715.050 could validly exempt residential unlawful detainer judgments from the automatic stay of the Bankruptcy Code, 11 U.S.C. § 362. In so doing, the Court of Appeal reversed an order dismissing the action on demurrer, and indicated the trial court should now issue an injunction requiring the Sheriff to enforce writs of possessions in residential unlawful detainer actions and proceed with evictions notwithstanding the filing of a bankruptcy petition by the tenant under 11 U.S.C. § 362. Pet. for Cert., App. p. 9 n.4 (referring to the "permanent injunction that will now be issued in the case").

This is to advise the Court that on remand the trial court, in accordance with the Court of Appeal's directions, has now entered a peremptory writ of mandate and injunction directing petitioner to comply with the provisions of California Code of Civil Procedure section 715.050 and enforce writs of possession in residential unlawful detainer actions notwithstanding the provisions of 11 U.S.C. § 362. The trial court's order, judgment and peremptory writ are set forth in the appendix to this brief. App., pp. 1-10.

As set forth in the discussion of jurisdiction contained in the Petition for Certiorari at pages 2-3, the Court of Appeal's opinion is hence conclusive and final as to the federal issue presented, and the outcome of further proceedings was preordained. Any appeal from the injunction, judgment and peremptory writ would be governed by the doctrine of law of the case with respect to the only issue presented in the action – application of the Supremacy Clause – and summary affirmance inevitable. *Tally v. Ganahl*, 151 Cal. 418, 421, 90 P. 1049 (1907); *United Dredging Co v. Industrial Acc. Com.*, 208 Cal. 705, 712, 284 P. 922 (1930) ("Where a decision upon appeal has been rendered by a District Court of Appeal and the case is returned upon a reversal, and a second appeal comes to this court directly or indirectly or intermediately, for reasons of policy and convenience, this court generally will not inquire into the merits of said first decision, but will regard it as the law of the case".)

Requiring Petitioner to again proceed through the California appellate system, including pro forma review and summary affirmance by the Court of Appeal and rejection of a subsequent petition for review by the California Supreme Court, solely in order to again seek certiorari in this Court, would result in additional delay of a year or more and prolong the uncertainty in an area of important Federal concern. During that time period, Petitioner, and indeed all other Sheriffs in the State of California will be put to the Hobson's choice of either complying with Code of Civil Procedure section 715.050 and facing a possible contempt citation or an action for damages and attorney's fees by a debtor under 11 U.S.C. § 362(h), or instead complying with the automatic stay

and facing a state court lawsuit for damages, injunctive relief and mandate directing compliance with the California statute. Thus, as stated in the Petition, under the decisions of this Court, the opinion of the Court of Appeal is properly before the Court and it is vital that the Court review the decision at this time. (See Petition pp. 2-4.)

Respectfully submitted,

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TIMOTHY T. COATES
By Timothy T. Coates
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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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| BEN LEE, APARTMENT ASSOCIATION OF GREATER LOS ANGELES, a corporation; APARTMENT ASSOCIATION of SAN FERNANDO VALLEY/ VENTURA, a corporation; APARTMENT ASSOCIATION of CALIFORNIA SOUTHERN CITIES, a corporation; FOOTHILL APARTMENT ASSOCIATION, a corporation; MINORITY APARTMENT OWNERS ASSOCIATION, a corporation, Petitioners and Plaintiffs, vs. SHERMAN BLOCK, Sheriff of Los Angeles County, California, DOE 1 and DOE 2, Respondents and Defendants. | ) | Case No. BC197745<br>JUDGMENT<br>(Filed Jan. 20, 2000)<br>DATE: January 20, 2000<br>TIME: 8:30 AM<br>DEPT. 55 |

The motion of plaintiffs BEN LEE, APARTMENT ASSOCIATION of GREATER LOS ANGELES, APARTMENT ASSOCIATION of SAN FERNANDO VALLEY/VENTURA, APARTMENT ASSOCIATION of CALIFORNIA SOUTHERN CITIES, FOOTHILL APARTMENT ASSOCIATION and MINORITY APARTMENT OWNERS ASSOCIATION ("plaintiffs") for Judgment on the Pleadings came on regularly for hearing on January 6 and 20, 2000, in Department 55 of the above entitled court; the Honorable Cesar Sarmiento, Judge presiding; plaintiffs appearing by counsel Trevor A. Grimm and Craig Mordoh of the CALIFORNIA APARTMENT LAW INFORMATION FOUNDATION and Defendant Sheriff of Los Angeles County, California ("defendant") appearing by counsel Nelson and Fulton through Henry Patrick Nelson.

Upon consideration of all evidence set forth and the papers submitted and the inferences reasonably deducible therefrom:

IT IS ORDERED, ADJUDGED AND DECREED that:

Judgment be entered for the plaintiffs and against the defendant, as follows:

1. A Peremptory Writ of Mandate issue from this Court compelled defendant and his agents and employees, and all persons acting under, in concert with or for him, to perform the ministerial duty, as required by law, to enforce valid writs of possession issued by State Courts in unlawful detainer actions notwithstanding the filing of a post-unlawful detainer judgment Bankruptcy petitioners by "evicted tenants," all in accordance with the provisions of *California Civil Code Section 715.050.*

2. A permanent injunction issue forthwith to compel defendant and his agents and employees, and all persons acting under, in concert with or for him, to perform the ministerial duty, as required by law, to enforce valid writs of possession issued by State Courts in unlawful detainer actions notwithstanding the filing of a post-unlawful detainer judgment Bankruptcy petitions by "evicted tenants," all in accordance with the provisions of *California Civil Code Section 715.050.*

3. That California Code of Civil Procedure Section 715.050 is declared constitutional and requires the enforcement by the County Sheriff of valid writs of possession resulting from unlawful detainer actions notwithstanding the filing of post-eviction-judgment Bankruptcy petitions by "evicted tenants."

3. No bond is required to be posted by plaintiffs and that Plaintiffs shall recover costs of suit, and that Plaintiffs' entitlement to recover attorneys' fees shall be determined by motion filed by plaintiffs.

DATED: 1-20, 2000

/s/ Cesar Sarmiento
Honorable Cesar Sarmiento
Judge Superior Court

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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TO RESPONDENT, Sheriff of Los Angeles County, California:

Judgment having been entered in this action ordering that a Peremptory writ of Mandate in the form stated below be issued by this Court, therefore.

**YOU ARE COMMANDED**, on receipt of this Writ, to enforce valid writs of possession issued by State Courts in unlawful detainer actions notwithstanding the filing of a post-unlawful detainer judgment Bankruptcy petitions by "evicted tenants," all in accordance with the provisions of *California Civil Code Section 715.050.*

**FURTHER, YOU ARE COMMANDED** to make and file a return to this Writ within twenty (20) days of the date a copy of this Writ is served on you showing what you have done to comply with this Writ.

Dated: 1-20-2000

/s/ Illegible
Clerk

LET THE FOREGOING WRIT ISSUE.

Dated: 1-20-00

/s/ Cesar Sarmiento
Honorable Cesar Sarmiento
Judge of the Superior Court

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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| BEN LEE, APARTMENT ASSOCIATION OF GREATER LOS ANGELES, a corporation; APARTMENT ASSOCIATION of SAN FERNANDO VALLEY/ VENTURA, a corporation; APARTMENT ASSOCIATION of CALIFORNIA SOUTHERN CITIES, a corporation; FOOTHILL APARTMENT ASSOCIATION, a corporation; MINORITY APARTMENT OWNERS ASSOCIATION, a corporation, Petitioners and Plaintiffs, vs. SHERMAN BLOCK, Sheriff of Los Angeles County, California, DOE 1 and DOE 2, Respondents and Defendants. | Case No. BC197745<br>ORDER<br>(Filed Jan. 20, 2000)<br>DATE: January 20, 2000<br>TIME: 8:30 AM<br>DEPT. 55 |

The motion of plaintiffs BEN LEE, APARTMENT ASSOCIATION of GREATER LOS ANGELES, APARTMENT ASSOCIATION of SAN FERNANDO VALLEY/VENTURA, APARTMENT ASSOCIATION OF CALIFORNIA SOUTHERN CITIES, FOOTHILL APARTMENT ASSOCIATION and MINORITY APARTMENT OWNERS ASSOCIATION ("plaintiffs") for An Order in Accordance With the Decision of the Court of Appeal and for Judgment on the Pleadings came on regularly for hearing on January 6 and 20, 2000, in Department 55 of the above entitled court; the Honorable Cesar Sarmiento, Judge presiding; plaintiffs appearing by counsel Trevor A. Grimm and Craig Mordoh of the CALIFORNIA APARTMENT LAW INFORMATION FOUNDATION and Defendant Sheriff of Los Angeles County, California ("defendant") appearing by counsel Nelson and Fulton through Henry Patrick Nelson.

Upon consideration of all evidence set forth and the papers submitted and the inferences reasonably deducible therefrom, the Court makes the following determinations: Plaintiffs' Motion for Order and Motion for Judgment on the Pleadings is granted for the following reasons:

(1) On *July 29, 1999,* in a unanimous published decision, the California Court of Appeal held that "The order of dismissal and the order sustaining the Sheriff's demurrer are reversed, and the cause is remanded to the trial court with directions to (1) enter a new order overruling the Sheriff's demurrers to Lee's claims for declaratory and injunctive relief."

(2) *California Civil Code Section 715.050,* requiring defendant to enforce valid writs of possession, notwithstanding the filing of post-unlawful detainer judgment Bankruptcy petitions by "evicted tenants," is a constitutional exercise of the State's police power and its right to determine the nature and character of state property rights, and does not conflict with the United States Bankruptcy Code or other federal law;

(3) As recognized by the holding of the appellate court in this action, under California Law a tenant no longer has any legal or equitable right to possession of real property following the rendering of an adverse judgment against the tenant in an unlawful detainer action for possession of such real property and the issuing of a writ of possession by the Court directing the Sheriff or enforcing officer to turn over possession of such real property to the person legally entitled thereto. Therefore, the automatic stay provisions of the Bankruptcy Code do not apply to the recovery of real property by enforcement of a writ of possession issued by a State Court when tenants file post-unlawful detainer judgment petitions in Bankruptcy because:

(a) After an adverse State Court judgment in an unlawful detainer action for possession of real property, an "evicted tenant" has no legal or equitable possessory interest in the subject real property that can be protected in a Bankruptcy proceeding;

(b) Enforcement of a writ of possession issued by a State Court following a judgment for possession of real property in an unlawful detainer action is an action solely against the subject real property;

(c) Enforcement of a writ of possession issued by a State Court following a judgment for possession of real property in an unlawful detainer action is not an action against the "evicted tenant;" and

(d) Enforcement of a writ of possession issued by a State Court following a judgment for possession of real property in an unlawful detainer action is not an action against any possessory interest in such real property owned by an "evicted tenant" since any prior such possessory interest in the subject real property would have been found forfeit as a part of any State Court judgment for possession of such real property.

**ACCORDINGLY, IT IS ORDERED** that defendant's demurrer, sustained without leave to amend, is hereby overruled and the order of dismissal is reversed, as to plaintiffs' claims for declaratory and injunctive relief. Plaintiffs' Fourth Cause of Action for Damages is dismissed without prejudice.

**FURTHER, IT IS ORDERED** that the Motion for Judgment on the Pleadings is granted in favor of plaintiffs and against defendant.

**FURTHER, IT IS ORDERED** that a Peremptory Writ of Mandate issue forthwith to compel defendant and his agents and employees, and all persons acting under, in concert with or for him, to perform the ministerial duty, as required by law, to enforce valid writs of possession issued by State Courts in unlawful detainer actions notwithstanding the filing of a post-unlawful detainer judgment Bankruptcy petitions by "evicted tenants," all in accordance with the provisions of *California Civil Code Section 715.050.*

**FURTHER, IT IS ORDERED** that a permanent injunction issue forthwith to compel defendant and his agents and employees, and all persons acting under, in concert with or for him, to perform the ministerial duty, as required by law, to enforce valid writs of possession issued by State Courts in unlawful detainer actions notwithstanding the filing of a post-unlawful detainer judgment Bankruptcy petitions by "evicted tenants," all in accordance with the provisions of *California Civil Code Section 715.050.*

**FURTHER, IT IS DECLARED** that California Code of Civil Procedure Section 715.050 is constitutional and requires the enforcement by the County Sheriff of valid writs of possession resulting from unlawful detainer actions notwithstanding the filing of post-eviction-judgment Bankruptcy petitions by "evicted tenants."

**FURTHER IT IS ORDERED** that no bond is required to be posted by plaintiffs and that Plaintiffs shall recover costs of suit, and that Plaintiffs' entitlement to recover attorneys' fees shall be determined by motion filed by plaintiffs.

DATED: 1-20, 2000

/s/ Cesar Sarmiento
Honorable Cesar Sarmiento
Judge Superior Court

Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

(3)

No. 99-1190

IN THE

# Supreme Court of the United States

LEE BACA, Sheriff of the County of Los Angeles and successor in office to Sherman Block,

*Petitioner,*

*v.*

BEN LEE, *et al.*,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether the California Court of Appeal erred as a matter of law when it determined that under California law, judgment for possession rendered in an unlawful detainer action extinguishes whatever legal or equitable interest the residential tenant might have had in that property and therefore a post-judgment bankruptcy filing by the tenant does not affect a landlord's right to regain possession of his own property.

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## INTRODUCTION

In brief, respondents' position as to the effect of Bankruptcy's Automatic Stay on the eviction of persons found guilty of unlawful detainer *in California* and the constitutionality of CAL. CODE CIV. PROC. § 715.050 is as follows:

1. In order for Bankruptcy's Automatic Stay to have any effect on a Debtor's eviction from real property in California, a Bankruptcy Court must be able to find under California state law the Debtor *to have* a legal, equitable or possessory right in such real property;

2. In order for a person to be judicially determined to be guilty of unlawful detainer of real property in California, under state law the person must be found *not to have* any legal, equitable or possessory right in such real property;

3. A Bankruptcy Court, as a matter of law, cannot ignore such judicial determination about the person-turned-Debtor to find the Debtor to have a legal, equitable or possessory right in such real property;

4. Since a Bankruptcy Court cannot find the Debtor to have any legal, equitable or possessory right in such real property as to which the Debtor has been found guilty of unlawful detainer under California state law, Bankruptcy's Automatic Stay cannot have any effect on the eviction of such Debtor from such real property;

5. Therefore, CAL. CODE CIV. PROC. § 715.050, which commands the eviction of such Debtor found guilty of unlawful detainer notwithstanding receipt of notice of the

Debtor's filing of a Bankruptcy proceeding, does not conflict with Bankruptcy's Automatic Stay and is constitutional.

## STATEMENT OF THE CASE

The lower court proceeding out of which this petition arises is entitled *Ben Lee, et al. v. Sherman Block, Sheriff of Los Angeles County*, and was heard in the Superior Court of the County of Los Angeles, Case Number BC197745.

Prior to May 20, 1998, CARLOS NAVARRO and ALMA RODRIGUEZ ("tenants") were tenants of the residential rental property located at 2414 Ridgewood, #2, West Covina, California ("premises") under a rental agreement ("agreement") made with Lee as the landlord.

Prior to May 20, 1998, tenants failed and refused to pay the rent due to Lee for the premises as called for in the agreement.

On May 20, 1998, Lee caused tenants to be served with a notice to pay rent or quit, demanding that tenants either pay the rent then due to Lee or quit and deliver up possession of the premises to Lee within three days ("notice").

Tenants failed and refused to pay the rent due to Lee for the premises or to deliver up possession of the premises to Lee within three days, either as required by the notice or at all, and therefore tenants were unlawfully detaining the premises from Lee. Based on tenants' default in the payment of rent and failure to quit and deliver up possession of the premises, Lee filed West Covina Municipal Court Case No. 98 U 1388 ("case") against tenants for unlawful detainer of the premises.

On June 25, 1998, Lee was awarded judgment in the case for unlawful detainer of the premises against tenants, *declaring that Lee had the right to recover possession of the premises from tenants.*

On July 8, 1998, a Writ of Possession Real Property ("writ"), *commanding the petitioner to place Lee in peaceful possession of the premises*, was issued by the Municipal Court.

On July 9, 1998, Lee caused the writ to be delivered to the petitioner along with payment of the required fees and charges and written instructions requesting the petitioner enforce the writ according to its terms and put Lee in peaceful possession of the premises. The petitioner scheduled enforcement of the writ (physical eviction of real parties) for July 22, 1998, and sent Lee a "Notice of Enforcement of Eviction."

On July 17, 1998, tenants filed a Voluntary Petition in Bankruptcy, Proceeding No. LA 98 38700 SB ("bankruptcy") and notified the petitioner of the bankruptcy filing. The petitioner advised Lee of the receipt of such notification *and refused to enforce the writ* on July 22, 1998, notwithstanding the provisions of CAL. CODE CIV. PROC. § 715.050.

11 U.S.C. § 362(a) provides for an Automatic Stay of the enforcement of certain judgments upon the filing of a bankruptcy petition. Due to this Automatic Stay, as a practice, the petitioner has refused to enforce valid writs of possession until a rental property owner has received relief from the Automatic Stay from the Bankruptcy Court.

In response to the overwhelming problems of owners faced with the time and expense of dealing with fake Bankruptcy petitions, the State of California adopted Senate Bill 690 ("SB 690") enacting CAL. CODE CIV. PROC. § 715.050, which provides, in part:

> Except with respect to enforcement of a judgment for money, a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay, *notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding*. (Emphasis added.)

In adopting SB 690, the Legislature found and declared as follows:

> (a) The landlord-tenant relationship is unique. Rent may not be accepted by the owner during the pendency of an unlawful detainer action without a potential waiver of all of the owner's rights under an eviction notice. Moreover, during the pendency of unlawful detainer proceedings (1) owners are not allowed to eliminate any services provided to the tenant with the intent to cause the tenant to vacate the premises, (2) owners are not excused from making continuing real property tax, mortgage, mortgage interest, utility, insurance or maintenance payments for the premises, and (3) owners are not allowed to retake possession by self-help.
>
> (b) Millions of dollars are lost by owners of residential rental property on a recurring annual

> basis and added to the rent of rent-paying tenants as a result of uncollected unlawful detainer judgments and the delays inherent in the state's unlawful detainer system.
>
> (c) Approximately 220,000 unlawful detainer cases are filed annually in the state, involving less than 5 percent of the state's rental units, costing millions of dollars in attorneys' fees and court costs, unnecessarily burdening court administration and taxpayers.

*West's Annotated California Code, Code of Civil Procedure*, § 1167.3, History and Statutory Notes.

On September 18, 1998 respondents filed a Petition for Writ of Mandate and Complaint for Declaratory Relief, Permanent Injunction and Damages seeking an order compelling the petitioner to carry out its ministerial duty and enforce the writ of possession.

On October 23, 1998 petitioner filed a Demurrer to respondents' Petition for Writ of Mandate and Complaint for Declaratory Relief, Permanent Injunction and Damages.

The hearing on the demurrer was heard on November 17, 1998, by the Honorable Joseph R. Kalin, who sustained the demurrer without leave to amend and dismissed the action.

Respondents filed a Notice of Appeal from the judgment on December 17, 1998.

Both sides submitted briefs and presented oral argument before Division One of the Second Appellate District, California Court of Appeal. Oral argument was heard on July 28, 1999.

On July 29, 1999, Justice Vogel delivered a unanimous published decision which held that an unlawful detainer judgment extinguishes a residential tenant's interest in the property, both legal and equitable, and that a post-judgment bankruptcy filing does not affect the landlord's right to regain possession of his property, because at that time the landlord's property is not part of the tenant/debtor's estate.

Petitioner sought review of this decision, filing a Petition for Review with the California Supreme Court. Review was denied by that Court on October 20, 1999. The California Supreme Court did not disturb the published opinion of the Appellate Court.

## REASONS FOR DENYING THE WRIT

### I.

### A BANKRUPTCY FILING DOES NOT AUTOMATICALLY STAY THE ENFORCEMENT OF A WRIT.

Despite the argument of petitioner, this case does not present a question of federal preemption, because under bankruptcy law the issue of whether a debtor has any legal or equitable property interest in the rental unit is determined by state law.

"The Court determines the rights of the Debtor under the lease by looking to state law." (Emphasis added.) *In re 163rd Street Medical Corp.*, 67 Bankr. 499, 500 (S.D. Fla. 1986).

A bankruptcy court must look to state law to determine what "legal or equitable interest" a debtor had at the commencement of the bankruptcy. *Butner v. United States*, 440 U.S. 48 (1979); *In re Farmers Markets, Inc.*, 792 F.2d 1400 (9th Cir. 1986); and *In re Schewe*, 94 Bankr. 938 (Bankr. W.D. Mich. 1989).

It is state law that determines whether the debtor's interest in any particular item of property is sufficient to confer a property right on the Bankruptcy estate. *In re Frederes*, 141 B.R. 289 (Bankr. W.D.N.Y. 1992).

Therefore, although Federal law will determine whether any interest claimed by a debtor is the "property of" the Bankruptcy estate, the Bankruptcy Courts must look to State law to make the determination if the debtor has any legal or equitable interest in any property as of the filing of a Bankruptcy Petition. *In re McLeon Trucking Co.*, 74 B.R. 820 (Bankr. W.D.N.C. 1987).

CAL. CODE CIV. PROC. § 1161 provides, in part, that:

> A tenant of real property, for a term less than life, or the executor or administrator of his estate heretofore qualified and now acting or hereafter to be qualified and act, is guilty of unlawful detainer: . . . 2) when he continues in possession, in person or by subtenant, without the permission of his landlord, or the successor in estate of his

> landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and 3 days notice, in writing, requiring its payment, stating the amount which is due, or possession of the property, shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such subtenant.

(Emphasis added.)

"The protections of the automatic stay only enure to the benefit of the Debtor, property of the Debtor, or property of the estate." (Emphasis added.) *In re Torrez*, 132 B.R. 924 (Bankr. E.D. Cal. 1991). "A tenant must at least have an equitable interest in the property." *In re Flexpak*, 49 B.R. 641 (Bankr. S.D.N.Y. 1985).

In *In re Kennedy*, 39 B.R. 995 (Bankr. C.D. Cal. 1984), the court therein held that "principles of federalism" militate in favor of bankruptcy court abstaining from the exercise of jurisdiction relative to a dispute concerning a foreclosure sale on a family home. *Kennedy* at 997. During its discussion of the issues involved, the *Kennedy* court asserted that the prior owner of the property, in bare unlawful possession following the foreclosure sale, does not "retain any property right therein." *Id.*

In construing congressional intent, the court recognized that while a "possessory interest" is a type of "equitable interest," in order for the debtor to have a "possessory interest," the debtor must have more than bare possession; he must have a *right* to possession.

The Court believes that by the use of the term "possessory interest" Congress intended that the debtor have a right to possession. As one bankruptcy court has stated, "the debtor's *de facto* possessory 'interest' which he seeks to protect . . . is really no interest at all. . . . (following termination of lease due to non-payment, debtors have no legal or equitable interest . . .)." *Kennedy* at 997.

These principles were reiterated by the United States Court of Appeals for the Ninth Circuit, in the case of *In re Windmill Farms, Inc.*, 841 F.2d 1467 (1988). That court held that a lease of real property is terminated under California law when the lessor affirms his election to terminate the lease as expressed in a notice to pay rent or quit which the lessor has previously served upon the lessee.

Accordingly, if the lessor properly notifies the lessee of the lessor's intention to terminate the rental agreement through a three-day notice to pay rent or quit, and if the unpaid rent is not paid within the appropriate notice period, and the lessor goes on to affirm his intention to terminate the lease by filing a complaint for unlawful detainer, the rental agreement has been terminated and once the judgment for possession is obtained the lessee retains *no* property interest, legal or equitable, with regard to the real property or the rental agreement.

The court in *Windmill Farms* based its decision upon the terms of the California unlawful detainer law:

> We look to California's unlawful detainer statutes . . . A tenant who is guilty of unlawful detainer cannot possibly have the right to possession of

> the property. He may still be in possession of the property, but his possession is *not rightful*; it is unlawful.

*Windmill Farms*, 841 F.2d at 1470 (Emphasis added.)

Except by postulating that unlawful possession is equivalent to a possessory interest, there is simply no authority that requires the application of the automatic stay to a tenant wrongfully holding over after a final state court adjudication of unlawful detainer. Because the *Windmill Farms* court clearly held that the unlawfully detaining tenant has no interest in the property under Section 541 of the Bankruptcy Act, the fact of bare possession does not require a stay of enforcement of a nonmonetary writ of possession.

Section 362(c)(1) of the Bankruptcy Act, 11 U.S.C. § 362(c)(1), provides further that "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate." Because the tenant who wrongfully holds over following a state court adjudication of unlawful detainer has no property interest in the residence, the provisions of the stay statute do not apply by their express terms.

It was with this background that Bankruptcy Judge Vincent Zurzolo ruled that:

> the Stay does not enjoin a landlord from regaining possession of residential premises from a wrongfully holding over bankruptcy debtor/ tenant, as long as the landlord seeks only to repossess the property and not to enforce any other

> portion of his unlawful detainer judgment against the Debtor and the Bankruptcy Estate, such as collecting money damages.

(Emphasis added.) *In re Sanya Smith*, 105 Bankr. 50, 55 (C.D. Cal. 1989).

And, the above ruling is not confined to one judge upset with the abuses inherent in the unlawful detainer/bankruptcy system. It has been the opinion of other Federal Courts in other circuits and also the independent opinion of the Indiana Appellate Court.

> It is settled law that an unexpired lease that was terminated before the filing of a bankruptcy petition is not property of the estate within the meaning of 11 U.S.C. Section 541 and is neither affected by the Automatic Stay under 11 U.S.C. Section 362(a) nor may be assumed by the Debtor.

(Emphasis added.) *In re Cohoes Industrial Terminal, Inc.*, 62 B.R. 379, 377 (S.D.N.Y. 1986); *In re Scarsdale Tires Inc.*, 47 B.R. 478, 480 (D.C. 1985).

"A lease terminated due to non-payment of rent and under applicable state law is not assumable nor subject to the application of the Automatic Stay Provision of 11 U.S.C. Section 362." (Emphasis added.) *In re 163rd Street Medical Corp.*, 67 B.R. 499, 500 (S.D. Fla. 1986).

*See also In re Liberty Tavern Corp.*, 94 B.R. 812 (S.D.N.Y. 1988); *In re Fidelity American Mortgage Co.*, 19 B.R. 568 (Bankr. E.D. Penn. 1982); *In re Grant Food Products*, 87 B.R. 6 (Bankr. Del. 1988); and *In re Cowboys, Inc.*, 24 B.R. 15 (Bankr. S.D. Fla. 1982).

Nor is this ruling confined to federal courts. Like our Second District Court of Appeal, the Indiana Appellate Court, based on its state law held that "In the present case there is no leasehold interest which the automatic Stay provision could protect at the time of the filing of the bankruptcy petition." (Emphasis added.) *White v. Indiana Realty Associates II*, 530 N.E.2d 326, 327 (Ind. App. 1988).

The enactment of CAL. CODE CIV. PROC. § 715.050 puts to rest any ambiguity which may have existed earlier and makes clear that neither the tenants nor the bankruptcy estate has any interest in the subject premises to which a stay might apply. It is not an issue of preemption or supremacy of law. Rather, it is the State of California making it clear that under California law, when a judgment for possession of real property has been issued by a state court *prior* to the filing of a bankruptcy petition, there is no legal nor equitable interest in the premises retained by the debtor thereafter and there is no property interest to protect in a *subsequent* Bankruptcy proceeding.

## II.

## THE DECISION OF THE UNITED STATES DISTRICT COURT IN *DI GIORGIO* IS FLAWED AND OF NO VALUE.

The petitioner's brief relies heavily on the reasoning and the conclusion of the United States District Court in the matter of *In re Di Giorgio*, 200 B.R. 664 (C.D. Cal. 1996). While the petitioner does note in passing that the Ninth Circuit Court of Appeals vacated the judgment, declaring the matter had been moot prior to its being heard by the District Court, *In re Di Giorgio*, 134 F.3d 971 (9th Cir. 1998),

he asserts that since the appellate court did not question the district court's reasoning, that reasoning has some value.

The appellate court did not address the legal issues at all. It held that the district court was wrong to address the legal issues, as the matter was moot and there was no authority for the court to do so.

To posit that by not addressing the underlying issue, the appellate court was somehow approving of the reasoning of the district court is the height of legal hubris. Especially as the Sheriff, who took the position in the *Di Giorgio* case that the stay does not apply, knows that the appellate panel expressed serious reservations about the district court's reasoning as it related to the issue of the stay.

That reasoning was extremely flawed. The district court relied, in part, upon CAL. CODE CIV. PROC. § 1006, yet that section confers no rights of any kind on a party in mere possession, especially unlawful possession, vis-à-vis the property owner. Section 1006 simply provides that "Occupancy for any period confers a title sufficient against all except the state and those who have title . . ." This section protects a mere occupant without any title from being ousted by a new trespasser. It grants no rights to a mere occupant vis-à-vis the owner.

This extremely limited right not to be ousted by new trespassers is no right at all as against a rightful holder of title to the property. *Tobin v. Stevens*, 200 Cal. App. 3d 235, 246 Cal. 478 (1988). Therefore, in the context of a tenant who has been declared to be in *wrongful* possession of the leasehold interest of the landlord, following a judgment for unlawful detainer, the tenant may fairly be said to have *no right of possession*.

Indeed, considering the Ninth Circuit's categorical assertion in *Windmill Farms* that an unlawfully detaining tenant has "no right to possession," it is impossible for Section 1006, which itself provides no right of possession in a mere occupant as against the owner, to somehow transform "no right to possession" into a protectible interest.

Moreover, since the purpose of Section 715.050 is to provide that under California law, in the context of a dispute between a landlord and a former tenant, the illegal occupant has no right to possession either legal or equitable, any rights the Section 1006 may have once conferred are no longer available in light of the subsequent enactment of 715.050.

None of the California cases relied on by the District Court evidence any aspect of California law which would convey any rights in rental property, whether legal or equitable, to a tenant against whom a writ of possession has issued. *King v. Goetz*, 70 C 236 (1886), cited by the court, is not on point as it held that a declaration of homestead filed by an owner of property in accordance with statutory law created certain equitable and legal rights in the person so filing.

*Bond v. Aickley*, 168 C 161 (1914), also cited by the court, involves a dispute between two parties, neither of which could demonstrate better title than that derived by mere possession. How could either of these cases transform what is essentially an illegal act, the unlawful detainer of a rental unit, into an equitable right?

The reasoning of the District Court in *Di Giorgio* should not be relied on by this Court. The weight of California law, as cited above, is that in these circumstances mere possession creates no legal or equitable rights in the possessor.

## III.

## RULE WITHOUT BASIS.

The petitioner lists a number of cases including *In re 48th Street Steakhouse, Inc.*, *In re Atlantic Business and Community Corp.*, *In re Turbowind, Inc.*, *Matter of Marcott*, 30 B.R. 633 (Bankr. W.D. Wis. 1983),[1] and *In re Convenient Food Mart No. 144, Inc.*, 968 F.2d 592 (6th Cir. 1992), for the proposition that a mere possessory interest in real property without any accompanying legal interest is sufficient to trigger the protection of the automatic stay.

What all these cases have in common is that none of them establish this legal principle based on independent legal reasoning. All of them cite backwards to the same source.

All of these cases rely on the ruling in *48th Street Steakhouse, Inc.* In turn, *48th Street Steakhouse, Inc.* relies on the ruling in the matter of *In re Onio's Italiana Restaurant Corp.*, 42 B.R. 319 (Bankr. 1984), which states at page 320 that "On the issuance of the warrant, the tenant has no legal interest in the property. He does have an equitable interest based upon possession." *Matter of GSVC Restaurant Corp.*, 3 B.R. 491, 494 (Bankr. S.D.N.Y.), *aff'd*, 10 BR. 300 (D.C.S.D.N.Y. 1980).

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1. *Matter of Marcott* and *In re Acorn Inv.*, 8 B.R. 506 (Bankr. S.D. Cal. 1981) also bases its decision on *Matter of Mimi's of Atlanta, Inc.*, 5 B.R. 623 (1980), which found a scintilla of equitable interest because state court eviction proceedings had begun but the writ had not issued when the bankruptcy was filed.

Again *Onio's* relies on an earlier decision for the rule it follows, stating no independent legal justification for this rule other than its use by an earlier court.

A review of all the cases cited by the Di Giorgios and all the legal authority relied on by those cases reveals that the very first instance of the supposed enunciation of this principle occurred in the case referred to in *Onio's Italiana Restaurant Corp.*, the *Matter of GSVC Restaurant Corp.*.

Turning to the *GSVC Restaurant Corp.*, and reviewing page 495, one quickly sees that the court made no such holding.

The court in *GSVC Restaurant Corp.* found that it was dealing with a debtor that

> has no legal interest in the property since "the issuing of a warrant for the removal of a tenant cancels the agreement under which the person removed held the premises and annuls the relation of landlord and tenant." The debtor's sole interest in the property is predicated on its possession of the plaintiff's property in the face of a judicially ordered warrant of eviction. The debtor asserts that such possession constitutes an equitable interest deserving of protection under the automatic stay.

*Id.* at 494. (Citation omitted.)

The court did not adopt the assertion of the debtor, although it recognized "that equitable, interest in property is regarded as property of the estate," *Id.* at 494, it did not

rule that mere possession as described above actually constitutes an equitable interest, nor did it rule that it does not. Rather, in addressing the issue the court merely *assumed*, for the sake of argument, that possession is a sufficient nexus to invoke the stay. However, the court does not adopt that proposition as a legal and controlling principle, nor does the court apply that principle to the facts of the case.

On appeal, the United States District Court recognized that the bankruptcy judge had found no legal interest, and had made no finding of any equitable interest. *Id.*, *aff'd*, 10 B.R. 300, 309 (D.C. S.D.N.Y. 1980), and had merely assumed for the sake of argument the existence of the equitable interest in its analysis.

The District Court prophetically noted that "It would be very chaotic if every eviction proceeding could ultimately be frustrated by the last minute filing of a Chapter 11 proceeding in federal court." *Id.* at 302.

These cases should not be relied on by the Court.

## CONCLUSION

Based on the foregoing, Lee was entitled to be placed in peaceable possession of the rental property by the petitioner without seeking relief from the Bankruptcy Court. Therefore, respondents respectfully request that the Court uphold the well reasoned decision of the California Court of Appeal and deny review in this matter.

Respectfully submitted,

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